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# Sovereignty vs. Internationalism and Where United States Courts Should Find International Law

Joseph Keller\*

## I. Introduction

As United States courts have faced increasingly difficult issues of international law, they have struggled to ascertain and decree the proper role of various international law sources within the U.S. constitutionally based system of federal law.<sup>1</sup> The current state of uncertainty over the future of international law in U.S. courts has sparked considerable debate among academics, as well as among politicians and in American culture more broadly.<sup>2</sup> The first section of this paper explores the policy concerns and theoretical issues underlying the debate about the proper role of international law in U.S. courts. After examining the tensions between competing theories of sovereignty and internationalism, this

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1. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004); *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *rev'd sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

2. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557 (2003); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825-26 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371-72 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475 (2003); see also H.R. Res. 568, 108th Cong. (2004) (there were sixty sponsors of this resolution to limit the use of foreign judgments, laws, or pronouncements in judicial determinations concerning the meaning of U.S. laws).

paper explains why concerns of sovereignty and democratic accountability counsel in favor of restricting the manner in which judges declare and interpret international law in U.S. courts.

The second section of this paper applies the conclusion reached in the first section by analyzing and critiquing several important decisions recently issued by U.S. courts involving the interpretation of international law. Challenging issues recently confronted by federal courts include the proper interpretation of treaties and other international agreements, the status of customary international law in U.S. courts, the status of academic works, and the separation of powers concerns raised when the judicial branch incorporates customary international law into U.S. law without authorization from Congress.<sup>3</sup>

This paper concludes that non-self-executing treaties and non-binding international agreements cannot provide a cause of action for plaintiffs in U.S. courts, and cannot trump inconsistent statutes or other federal law. This paper also takes the position that courts should look to the writings of academics (including the Restatement) only as secondary evidence of the content of customary international law. As a further matter, this paper discusses the distinction between customary international law and *jus cogens* and the proper role of each as a source of law in U.S. courts. This paper argues that U.S. courts are not bound to apply a rule of customary international law unless the U.S. has assented to that rule through the appropriate democratic processes.

## II. Sovereignty vs. Internationalism: The Competing Visions Underlying the Debate

Why all the controversy over the proper role of international law in U.S. courts? At the heart of this debate lies the competition between traditionally held notions of state sovereignty and a world view that may be termed internationalism.

### A. *Sovereignty and Democratic Accountability*

In analyzing these competing theories, it is important to flesh out in more detail exactly what is meant by "sovereignty."<sup>4</sup> Specifically, the concept of democratic accountability is central to the ideal of state sovereignty. Professor Weisburd frames this issue as a question of legitimacy: "More fundamentally, by relying on sources other than state

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3. See cases cited *supra* note 1; see also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

4. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1596 n.2 (2003) (discussing the lack of precision inherent in the term "sovereignty").

behavior to determine the content of CIL [customary international law], a court effectively transfers legislative power to groups with little right to claim it—such as judges of international tribunals whose authority is carefully circumscribed in their founding instruments—or no right at all—such as legal academics.”<sup>5</sup> At the heart of this idea is the concern that law will be made by actors not politically accountable for their actions.

In an ideal democracy, politically accountable individuals and groups make the laws and important policy decisions. It should not be surprising then that courts should be concerned when lawmaking power is delegated to international actors completely outside the government:

By transferring legal authority from U.S. actors to international actors—actors that are physically and culturally more distant from, and not directly responsible to, the U.S. electorate—these delegations may entail a dilution of domestic political accountability. This accountability concern may be heightened by the lack of transparency associated with some international decisionmaking, which in turn may increase monitoring costs and the potential for what economists call “rent-seeking.”<sup>6</sup>

As noted by Bradley, concerns about political accountability are even more troublesome when the actors to whom power is delegated are so far removed from the individuals over whom they exercise power. Furthermore, problems of transparency afflict not only traditional international decision making by international institutions (such as the WTO), but also the emergence of rules of customary international law. A U.S. court searching for a rule of customary international law is not likely to find a legislative history revealing the true intent behind the state actions giving rise to the rule. How can a court answer the question (often crucial to analysis of customary international law) of whether a state acted out of a sense of legal obligation?

The possibility that courts will incorrectly look to academics to define the rules of customary international law raises even more disturbing transparency concerns. What personal ambitions, motives or prejudices might underlie the writings of an academic is anyone’s guess. The court in *Yousef* persuasively made this point: “This seemingly idealistic position has been rejected by other scholars, who note that it is ‘obvious’ that ‘subjective factors’ and ‘national and other prejudices’ freely may enter into the writings of publicists, particularly those who ‘see themselves to be propagating new and better views.’”<sup>7</sup> Indeed, one

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5. Weisburd, *supra* note 2, at 1531.

6. Bradley, *supra* note 2, at 1558.

7. *United States v. Yousef*, 327 F.3d 56, 102 (2d Cir. 2003) (quoting IAN

hardly knows whether an academic actually believes the theories set forth in his or her own writings. An article by a law professor may appear in a prestigious journal, boldly and authoritatively declaring X to be a well established rule of customary international law, with great academic pomp and bravado, yet one cannot know if this article was put together hastily in a desperate attempt to meet a publishing deadline. Or perhaps more likely, given the strict criteria for law review articles (a topic should be “ripe” and present a new idea not “preempted” by another author), the professor merely espoused his/her theory because it was new or unique, and not because it is well supported logically or advisable as a matter of public policy. For these reasons, and for the obvious lack of political accountability of academics, academic writings should occupy the bottom rung on the ladder of sources courts examine to ascertain a rule of international law.

These transparency and political accountability concerns support the view that courts should not look to international law that has not been incorporated into U.S. law to provide a rule of decision in a case. Problems abound with this approach. For example, how can litigants reasonably have notice of what their rights are in court when a judge may look to a source of international law completely external to the properly enacted statutes of the U.S.? How will the attorneys advise litigants of the chances of success on the merits when judges may (or may not) decide what result they desire in a case and then search international law until coming up with a source that supports their desired result?<sup>8</sup> This inappropriate result-driven analysis is aided by law professors who casually affix the tag of “customary international law” on any norm they deem morally significant enough to warrant the status of that label. The preferable method of judicial analysis would exercise some caution, restraint, and a measure of deference to the legislative branch.

### *B. Internationalism*

Internationalism, as used in this paper, refers to the movement of thinkers who would like to see the courts incorporate international law directly into federal law without any independent directive from Congress. One important feature of internationalism is the way it envisions the role of the national political branches: “National legislatures play, at best, a decidedly secondary role in the process of supranational policymaking.”<sup>9</sup> One justification for this limitation on the

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BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24 (5th ed. 1999)).

8. See generally *Lawrence v. Texas*, 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting).

9. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of*

national government is the need “to address problems beyond the effective political control of even the largest individual states.”<sup>10</sup> Internationalists seem frustrated with the government of the U.S. and its policies, especially with respect to international human rights law. In addition to the U.S. practice of declaring treaties non-self-executing, other examples of frustrating U.S. positions include the U.S. refusal to support the International Criminal Court and the U.S. practice of suggesting immunity on behalf of foreign governments in Alien Tort Act lawsuits.<sup>11</sup>

Indeed, the internationalist view seems tied in very closely with concerns about individual human rights and the relationship between the individual and the sovereign state in the context of human rights. Traditionally held notions of state sovereignty were questioned in aftermath of the atrocities of World War II: “The unspeakable atrocities and gross human rights violations of the World War II era highlighted a new responsibility of the world community to respect, promote and protect the fundamental human rights of the individual.”<sup>12</sup> In response to these concerns, the international community produced the Universal Declaration of Human Rights as well as the Covenant on Political and Civil Rights, and the Covenant on Social and Economic Rights. These instruments signify an international movement towards protecting individual rights.

Inevitably, this movement had some impact on notions of state sovereignty: “It must be stressed that the very notion of the existence of human rights of individuals necessarily implies a restriction or limitation upon the sovereign power of states and governments.”<sup>13</sup> In other words, at some point state sovereignty intersects with human rights, and one or the other must give way: “Regardless of the underlying philosophical or theoretical basis, no nation today may claim a sovereign right to violate those fundamental and unalienable universal rights.”<sup>14</sup> As a matter of international law, this statement may be correct; in cases of actual violation of fundamental human rights, a state may not claim a sovereign *right* to commit those abuses. Note, however, that for purposes of domestic liability in U.S. courts, there is no general exception to sovereign immunity for violations of human rights law or blatant

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*Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 632-33 (1999).

10. *Id.* (quoting Wolf Sauter, *The Economic Constitution of the European Union*, 4 COLUM. J. EUR. L. 27, 66 (1998)).

11. See *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

12. Judge Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT’L L.J. 137, 139-40 (2003).

13. *Id.* at 140.

14. *Id.*

violations of international law.<sup>15</sup> This does not mean that the U.S. has chosen to encourage or tolerate human rights abuses as a policy matter or to acquiesce in a state's claim of right to commit human rights abuses. It merely indicates that some sovereign actions in violation of international law will not fit any of the exceptions to sovereign immunity in the Foreign Sovereign Immunities Act (FSIA). When this proves to be the case, the U.S. court must dismiss the lawsuit without prejudice on procedural grounds for lack of jurisdiction.

A different case is presented when the issue involves international law sources in U.S. courts and whether or not they create private rights of action. For example, it may be correct to state that the U.S. cannot assert a sovereign right to commit human rights abuses in violation of international law, but when the U.S. declares that an international human rights treaty is non-self-executing, it does not thereby *violate* international law. A declaration of non-self execution is not an endorsement of the commission of human rights abuses. It merely declares that the treaty in question will not of itself provide a private cause of action cognizable in U.S. courts. International law does not require the U.S. to open its courts to civil claims based on violations of international human rights treaties. Furthermore, a non-self-executing treaty does not *deny* a cause of action in U.S. courts for civil wrongs based on human rights abuses. A declaration to such a treaty merely provides that the treaty itself will not provide a cause of action. Plaintiffs may still pursue justice under some other source of law. For example, a plaintiff suing an official of a foreign government for an act of state sponsored terrorism has a cause of action under the Flatow Amendment to the FSIA,<sup>16</sup> irrespective of whether any human rights treaty fails to provide a cause of action.<sup>17</sup>

Therefore the internationalist concern over non-self-executing treaties seems misplaced. Undoubtedly, victims of human rights abuses or other violations of international law have a legitimate interest in pursuing justice. Nevertheless, it is not the role of judges (with the assistance of law professors) to circumvent the legislative process and create private rights of action for these victims from international sources of law not incorporated domestically. This method of judicial interpretation (if it may be termed that) has no logical stopping point and provides federal judges with unfettered discretion to declare the law as they think it should be, rather than as provided for by Congress or the

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15. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (2005).

16. 28 U.S.C. § 1605 at (a)(7).

17. See Joseph Keller, *The Flatow Amendment and State Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029 (2005).

legitimate common law tradition of U.S. courts. The founders of the Constitution of the United States created three separate branches of government in order to guard against precisely this type of unchecked power and its inherent dangers of subjective bias, abuse and arbitrariness.

### III. Lessons From the Judicial Battlefield: Recent Decisions in United States Courts

#### A. *Al Odah v. United States: The Legal Status of Non-Self-Executing Treaties and Other International Agreements in U.S. Courts*

It is useful to begin examination of the role of international law in U.S. courts by looking at the manner in which courts have treated the issue in recent litigation. In *Al Odah v. United States*, the plaintiffs were detainees captured during hostilities in Afghanistan and held at the Guantanamo Bay Naval Base in Cuba.<sup>18</sup> They brought three actions contesting the legality and conditions of their confinement at Guantanamo Bay. In addition to seeking habeas corpus relief, the plaintiffs invoked the Alien Tort Act,<sup>19</sup> alleging that the U.S. imprisoned them in violation of treaties and international law.<sup>20</sup> The D.C. Circuit held that it lacked jurisdiction to hear the case because the Constitution did not entitle the plaintiffs, as aliens without property or presence in the United States, to due process of law.<sup>21</sup> As additional grounds for dismissal, the court held that Cuba, pursuant to a lease with the U.S., had proper jurisdiction over the plaintiffs' actions.<sup>22</sup> The Supreme Court reversed, holding that jurisdiction existed because habeas corpus acts not upon the prisoner who seeks relief, but upon the person who holds him in alleged unlawful custody, as long as that custodian can be reached by service of process.<sup>23</sup>

While the majority opinion in the D.C. Circuit disposed of the case on jurisdictional grounds, a concurring opinion by Judge Randolph addressed the important issue of the proper role of international law in U.S. courts.<sup>24</sup> Judge Randolph's opinion highlighted one particularly controversial question of international law: to what extent and under what conditions do human rights treaties create private rights of action in U.S. courts? Judge Randolph pointed out that the plaintiffs in *Al Odah*

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18. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

19. 28 U.S.C. § 1350 (2005).

20. *Al Odah*, 321 F.3d at 1144.

21. *Id.* at 1141.

22. *Id.* at 1142-44.

23. *Rasul v. Bush*, 542 U.S. 466 (2004). The Supreme Court did not discuss the broader issues of treaty law addressed in Judge Randolph's opinion.

24. *Al Odah*, 321 F.3d at 1145.



petitioned the court to take the position that a cause of action for treaty violations is cognizable under the Alien Tort Act.<sup>25</sup> As Judge Randolph noted, construing the Alien Tort Act so broadly would "grant aliens greater rights in the nation's courts than American citizens enjoy."<sup>26</sup> The better answer, as explained by Judge Randolph, is that treaties do not create private rights of action in U.S. courts unless they are self-executing.<sup>27</sup> In other words, unless Congress explicitly provides for a cause of action, a non-self-executing treaty by itself will not provide one. An early U.S. Supreme Court decision recognized that a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court."<sup>28</sup> Nevertheless, the plaintiffs in *Al Odah* attempted to base a cause of action on the non-self-executing Geneva Convention of 1949.<sup>29</sup> Furthermore, as Judge Randolph pointed out, plaintiffs in other cases have based a cause of action under the Alien Tort Act on customary international law as derived from the International Covenant on Civil and Political Rights (ICCPR).<sup>30</sup> Not only is this multilateral agreement non-self-executing, but the Senate ratified the agreement on the basis that it would "not create a private cause of action in U.S. courts."<sup>31</sup> As one scholar aptly asserted:

In short, if the ICCPR is self-executing, and since the U.S. has ratified it, individuals would be able to avail themselves of the United States court system for vindication of violations of the rights the ICCPR proclaims. If, on the other hand, a treaty is non-self-executing, it does not have an immediate effect in the domestic legal system of the United States. Further action by the political branches of government in the form of implementing legislation is needed to incorporate or implement the treaty into domestic law. As such, despite the fact that treaties are the law of the land, the United States courts would not apply the treaty (absent implementing legislation) to disputes which come before it.<sup>32</sup>

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25. *Id.* at 1146.

26. *Id.* In *Rasul v. Bush*, the Supreme Court held "28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone." 542 U.S. 466, 563 (2004).

27. *Al Odah*, 321 F.3d at 1146. Judge Randolph includes a long string cite of case law supporting his point.

28. *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

29. *Al Odah*, 321 F.3d at 1147.

30. *Id.* (discussing *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (1998)).

31. *Id.* (quoting S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992)).

32. Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 766-67 (1995).

By allowing a claim to proceed on the basis of the ICCPR, a court would allow plaintiffs to circumvent and indeed defy the will of Congress.

A judicial decision recognizing a cause of action where Congress has explicitly acted to deny one raises separation of powers issues. However, the theory that non-self-executing treaties provide a cause of action in U.S. courts is not without support in the academic literature.<sup>33</sup> Professor Paust takes the position that customary international law is federal law and is “directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base.”<sup>34</sup> More specifically, with respect to treaties Paust claims:

The Supremacy Clause mandates that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” not that some treaties or only “self-executing” treaties have that effect. Certainly a mere declaration of a President, even with full consent of the Senate, cannot alter a constitutional command. Thus, a declaration of non-self-execution, even if not void under international law, is unconstitutional and void under the Supremacy Clause.<sup>35</sup>

In his attempt to define declarations of non-self-execution as void under the Supremacy Clause of the Constitution, Paust misses the point. Declarations to a treaty (as well as reservations and understandings) do not contradict the treaty, but (at the very least for purposes of domestic law) are in fact a part of the treaty itself and cannot be selectively weeded out of the context of the larger treaty text. What Paust describes as the “constitutional command” of the treaty should be discovered from the totality of its components, including the declaration of non-self-execution. In fact, Paust’s language betrays his purpose because it is the “mere” declaration of a President, along with the “full consent of the Senate,” which renders a treaty constitutionally valid in the first instance. A treaty is not “made” as provided for in the Supremacy Clause until these conditions have been satisfied. It is inappropriate and incorrect for Paust to separate the legal effect of the text of a treaty from its declarations, reservations, and understandings. A court applying Paust’s method would recognize a constitutionally invalid document: a treaty different from that consented to and ratified by the Senate.

Other commentators provide a more persuasive view of treaty

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33. See Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301 (1999).

34. *Id.* at 305.

35. *Id.* at 324.

interpretation in the context of private lawsuits in federal court:

Under the requirement of self-executing treaties, a treaty that is not "self-executing" cannot be enforced by private parties unless it has been implemented by statute. The mere fact that a treaty exists, and that if adhered to would work to the benefit of the plaintiff, does not necessarily give the plaintiff a right to prevail. The reason is that [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are party to it. . . . [W]ith all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations . . . which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress.<sup>36</sup>

It is important to observe that a plaintiff relying in part on a non-self-executing treaty is not necessarily defeated in his attempt to bring a lawsuit in federal court. For example, a plaintiff may yet succeed in bringing a claim under some domestic legislation or under a common law theory of recovery in tort law.<sup>37</sup> These other sources of law may grant plaintiffs legal rights not vested in individuals by treaty.

Closer examination of the Constitution casts doubt on the theory that the Judiciary, without authorization from Congress, possesses the power to define and incorporate international law into U.S. law. Article I, Section 8, Clause 10 of the Constitution gives Congress the power to "define and punish . . . Offenses against the Law of Nations." Judge Randolph makes a crucial historical observation regarding this clause of the Constitution: "[t]he Framers' original draft merely stated that Congress had the power to punish offenses against the law of nations, but when Gouverneur Morris of Pennsylvania objected that the law of nations was 'often too vague and deficient to be a rule,' the clause was amended to its present form."<sup>38</sup> This history of Article I, Section 8, Clause 10 supports the understanding that the Framers changed their original draft in order to provide Congress, not the Judiciary, with the power to *define* offenses against the law of nations. Under this view, Congress bears the constitutional authority of affirmatively incorporating principles of international law into the laws of the United States. As a necessary corollary of this principle, U.S. courts cannot infer a cause of

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36. Lea Brilmayer, *International Law In American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2303-04 (1991).

37. *Id.*

38. *Al Odah*, 321 F.3d at 1147.

action based on violations of international law as defined in a non-self-executing treaty or non-binding U.N. resolution.

*B. United States v. Yousef: The Legal Status of the Writings of Academics and Other Scholarly "Sources" of International Law in U.S. Courts*

If courts cannot properly recognize a cause of action based on a violation of international law as defined in a non-self-executing treaty, it is even more incorrect for courts to allow the writings of academics to define international law and the rights it provides in U.S. courts.<sup>39</sup> In *United States v. Yousef*, the defendants appealed from convictions for conspiracy to bomb commercial airplanes in Asia and the World Trade Center in 1993.<sup>40</sup> The Second Circuit held that the District Court had jurisdiction over the actions of the defendants, but that the District Court had erred in partly basing jurisdiction on the universality principle of customary international law because it had relied on the statements of commentators instead of on the practice and customs of States.<sup>41</sup>

In reaching this conclusion, the court attacked the self-proclaimed status of international law professors: "This notion—that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent—may not be unique, but it is certainly without merit."<sup>42</sup> The court provided this analysis in response to the particularly bold assertion of academic power by Professor Louis B. Sohn (the emeritus Bemis Professor of International Law at the Harvard Law School):

I submit that states really never make international law on the subject

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39. A useful analogy may be drawn to art. XXXVIII(1) of the Statute of the International Court of Justice, which provides a list of international law sources for consideration by the court, with the writings of academics occupying the bottom position:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

40. *United States v. Yousef*, 327 F.3d 56, 78 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003), post conviction proceedings, remanded by 395 F.3d 76 (2d Cir. 2005).

41. *Yousef*, 327 F.3d at 96-100.

42. *Id.* at 102.

of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in the leading international law journals. . . . This is the way international law is made, not by states, but by "silly" professors writing books[.]<sup>43</sup>

As the court notes, Sohn's theory of international lawmaking by professors is disturbing in part because professors lack democratic accountability. In addition to their obvious lack of democratic accountability, many such professors are isolated within the ivy lined walls of academia, having practiced law for only a few short years, if at all. Therefore, the writings of law professors provide even weaker evidence of the proper role of international law in U.S. courts than do non-self-executing treaties or other non-binding international agreements, which at least reflect the thinking and aspirational (although not binding) goals of states.

Implicit in Sohn's language is the notion that academics "care" about international human rights law in a way that states do not. This questionable notion ignores the practical realities faced by states as actors in the international arena. States, unlike law professors, must weigh the practical consequences of incorporating international human rights concepts into domestic law. The United States Congress, as a legislator, might decline to incorporate into domestic law particular human rights concepts out of concern for the potential foreign policy ramifications produced by judicial recognition of an ever-expanding list of vaguely defined human rights norms. For example, suppose the U.S. by statute explicitly declined to provide federal jurisdiction over certain torts committed against aliens abroad (assuming, for purposes of argument, the constitutionality of such legislation). One purpose of this hypothetical legislation might be to advance U.S. foreign policy goals and diplomatic relations by preventing U.S. courts from entertaining lawsuits against foreign sovereigns (including unfriendly sovereigns such as Iran and Syria). The conduct by the executive branch of diplomatic relations, especially with potentially dangerous states, is a sensitive and often difficult task. By utilizing the advice and assistance of uniquely qualified and informed experts in the executive branch, Congress may for a variety of legitimate policy reasons decline to incorporate into domestic law otherwise laudable human rights norms. Therefore, passage of this hypothetical legislation would not demonstrate that the United States (or any other sovereign) does not "care" about human rights, rather it would signal that states must balance human rights

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43. *Id.* at 101 (quoting Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 399, 401 (1996)).

concerns against other legitimate goals of the sovereign. By contrast, law professors may safely champion the cause of human rights without closely examining the competing interests of the state.

Other academics have humbly disavowed the self-aggrandizing theories of colleagues such as Professor Sohn.<sup>44</sup> Professor Weisburd correctly notes that the writings of scholars are only as reliable as the scholar's sources and must be treated only as secondary evidence of the content of international law:

Put simply, and despite protestations to the contrary by some scholars (or "publicists" or "jurists"), a statement by the most highly qualified scholars that international law is x cannot trump evidence that the treaty practice or customary practices of States is otherwise, much less trump a statute or constitutional provision of the United States at variance with x. This is only to emphasize the point that scholars do not make law, and that it would be profoundly inconsistent with the law-making processes within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law.<sup>45</sup>

Weisburd makes the key point that the hierarchy of sources of law in U.S. courts begins with the Constitution and statutes of the U.S. and continues downward from there. A scholarly pronouncement at odds with one of these sources must therefore fail. Further, when U.S. courts determine the content of international law, the actual practice of states trumps the writings of law professors. To hold otherwise would allow law professors to govern international law as "philosopher kings, imposing their ideas of what the law should be under the guise of describing the law's content."<sup>46</sup> Courts should be careful to ascertain international law as actually practiced by states rather than as law professors believe it *should* be practiced.<sup>47</sup>

The *Yousef* court also correctly criticized the District Court's reliance on the Restatement (Third) of the Foreign Relations Law of the United States.<sup>48</sup> The court held that the District Court's misplaced reliance on the Restatement had been a critical error leading to the incorrect conclusion of universal jurisdiction over *Yousef*.<sup>49</sup> Explaining

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44. See A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475 (2003).

45. *Id.* at 1508.

46. *Id.* at 1478.

47. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").

48. *Yousef*, 327 F.3d at 99.

49. *Id.*

the rationale behind its conclusion, the court noted of the Restatement: "Such works at most provide evidence of the practice of states, and then only insofar as they rest on factual and accurate descriptions of the past practices of states, not on projections of future trends or the advocacy of the 'better rule.'"<sup>50</sup> As the court notes, the Restatement is merely the cumulative work of a group of academics (the American Law Institute (ALI)) and does not necessarily reflect the actual practice of states. The *Yousef* court examined the ALI handbook and discovered that "the ALI handbook for reporters instructs that reporters are 'not compelled to adhere to . . . a preponderating balance of authority but [are] instead expected to propose the better rule and provide the rationale for choosing it.'"<sup>51</sup> The Restatement as a source of customary international law thus suffers from the same fundamental flaw as the writings of academics: it does not reflect international law as actually practiced by states but instead reflects attempts by individuals to create a perceived "better" rule of international law. United States courts should not give merely aspirational rules pronounced by the ALI the status of customary international law until such rules accurately describe the customs and practice of states.

C. *The Alvarez-Machain Decision and the Legal Status of Customary International Law (CIL) and Jus Cogens in U.S. Courts*

Having established that the content of customary international law should be defined by reference to the practice of states rather than the writings of academics or other scholarly sources, the next analytical question is: where must a court locate the practice of states; and what level of state practice is sufficient to give rise to a rule of customary international law cognizable in U.S. courts? Again it is helpful to examine an important recent decision in federal court to help frame this issue: *Alvarez-Machain v. United States*.<sup>52</sup>

In *Alvarez-Machain*, the plaintiff (Alvarez-Machain) is a Mexican national who was kidnapped in Mexico by Mexican citizens acting on behalf of the U.S. Drug Enforcement Administration (DEA) and brought to the U.S. to be tried for his role in the murder and torture of DEA agent Enrique Camarena-Salazar.<sup>53</sup> Alvarez-Machain was acquitted for his

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50. *Id.*

51. *Id.* at 100 (quoting *The Restatement Process*, 10 KAN. J. L. & PUB. POL'Y 2, 6 (2000)).

52. *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003); *rev'd*, 542 U.S. 692 (2004), *vacated*, 374 F.3d 1384 (2004). This paper will focus primarily on the Ninth Circuit decision.

53. These cases have a long and complicated procedural history. See *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991) ("*Alvarez-Machain I*"),

role in the murder of Salazar and subsequently sued a Mexican national under the Alien Tort Claims Act (ATCA) and the United States under the Federal Tort Claims Act (FTCA), alleging various torts and violations of international law in connection with his forcible abduction from Mexico.

A central issue in the case is whether the abduction of Alvarez-Machain constituted a “violation of the law of nations,” a predicate to federal court jurisdiction under the Alien Tort Claims Act (“ATCA”).<sup>54</sup> The ATCA provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>55</sup> Therefore, in order to prove his claim under the ATCA, Alvarez-Machain needs to prove the defendant(s) violated the law of nations.

The Ninth Circuit held that “the unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA.”<sup>56</sup> The court therefore held the defendant Mexican policeman liable under the ATCA and reversed the district court’s dismissal of the FTCA claims against the U.S. The Supreme Court reversed, holding that the detention of Alvarez violated no norm of customary international law well defined enough to support a cause of action under the Alien Tort Statute: “[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>57</sup>

A dissenting opinion in the Ninth Circuit by Judge O-Scannlain, joined by Judges Rymer, Kleinfeld and Tallman, sets forth a persuasive interpretation of the role of customary international law in U.S. courts. The dissent frames the issue simply:

Do American law enforcement agents violate well-established principles of American jurisprudence when they apprehend a duly-indicted suspect outside the confines of our nation’s borders? The answer is clearly no; the United States has neither now nor ever agreed to an asserted international law principle prohibiting the practice of transborder abduction.<sup>58</sup>

Crucial to the dissent’s position is the focus on whether or not the U.S. has ever actually consented to the alleged rule of international law

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rev’d, 504 U.S. 655, 669-70 (“*Alvarez-Machain II*”).

54. *Alvarez-Machain*, 331 F.3d at 608 (quoting 23 U.S.C. § 1350 (2003)).

55. 28 U.S.C. § 1350 (2005).

56. *Alvarez-Machain*, 331 F.3d at 620.

57. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2769 (2004).

58. *Alvarez-Machain*, 331 F.3d at 646.



prohibiting transborder abduction. The U.S. is not bound to recognize in its courts a claim based on a norm of customary international law it has not subscribed to. The dissent would like to see evidence that such a prohibition has been incorporated into U.S. law by the appropriate political process: "[A] proper historical understanding of the ATCA compels the conclusion that no claim can prevail where the United States, through its political branches, does not acquiesce in an international norm."<sup>59</sup>

The dissent explains that a rule of customary international law is not binding in U.S. courts without U.S. consent because in the absence of consent it cannot meet the requirement of universality articulated in the *Marcos II* case.<sup>60</sup> This statement is correct doctrinally, for a rule of customary international law cannot be deemed universal if it is not recognized by the home nation of the court applying the rule. Further, the political branches of the U.S. retain ultimate power over the content of international legal obligations:

The federal common law's incorporation of the law of nations, in short, is not beyond the political branches' power to alter. And this fact is entirely consonant with the principle, expressed in our cases as elsewhere, that "customary international law, like international law defined by treaties and other international agreements, rests on the consent of states." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *see id.* ("A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. . . ." (citing Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement] § 102 cmt. d)).<sup>61</sup>

The dissent's position is consistent with recognizing state practice as the ultimate baseline for determining a rule of customary international law. State practice cannot be said to confirm a rule of customary international law when the very state applying the rule has consistently objected to it or refused to incorporate it into national law through the appropriate legislative channels. It must be pointed out that in the instant case the U.S. government expressly authorized the abduction that formed the basis of the plaintiff's claims. Therefore the dissent correctly states, "an ATCA plaintiff relying on the law of nations (as opposed to a treaty) must allege a tort that violates some norm of international law recognized by the United States."<sup>62</sup> To hold otherwise would allow

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59. *Id.* at 647.

60. *Id.* *See In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).

61. *Alvarez-Machain*, 331 F.3d at 649.

62. *Id.* at 650.

international sources of law to supersede the laws properly enacted by democratically elected representatives of the people of the U.S. The judiciary would exceed its constitutional mandate by enforcing laws not assented to by the political branches of the government.<sup>63</sup> To summarize, in order to be actionable in U.S. courts, a principle of customary international law must be incorporated into the laws of the U.S. by the appropriate democratic processes.

There is one category of international law rules from which, some commentators claim, states are not permitted to derogate. Commentators have described *jus cogens* as holding "the highest hierarchical position among all other norms and principles. As a consequence of that standing, *jus cogens* norms are deemed to be 'peremptory' and 'non-derogable.'"<sup>64</sup> The concept of *jus cogens* was first discussed by scholars of international law following World War I<sup>65</sup> and finds its textual explication in the Vienna Convention on the Law of Treaties.<sup>66</sup> Before determining the status of *jus cogens* in U.S. courts, it is important to note that the U.S. is not a party to the Vienna Convention on the Law of Treaties. Furthermore,

Only ninety-one other states are parties. By comparison, 189 states are members of the United Nations. That is, fewer than half the states in the world have bound themselves to the Vienna Convention, and thus to a treaty obligation to accept the *jus cogens* concept. If U.S. courts are to treat the concept as a part of international law, then they must justify their action by relying on some source of law other than either a treaty obligation of the United States or near universal acceptance by states through a multilateral treaty.<sup>67</sup>

As Weisburg points out, the *jus cogens* concept cannot derive its authority in U.S. courts from universal or near universal acceptance by states. Therefore U.S. courts must find some other justification for relying on the *jus cogens* concept as a rule of decision in a given case.

The Ninth Circuit (majority opinion) took the opportunity to distinguish the concept of *jus cogens* from customary international law:

In contrast, *jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by

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63. See *id.*

64. See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 40 (2d ed. 1999). See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 515 (5th ed. 1998) ("The major distinguishing feature of [*jus cogens*] rules is their relative indelibility.").

65. A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1489 (2003).

66. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, pt. V2, art. 53, 1155 U.N.T.S. 331, 344; 8 I.L.M. 679, 698-99 [hereinafter Vienna Convention].

67. Weisburd, *supra* note 65, at 1489.

the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent.<sup>68</sup>

The court then stated that a violation of a *jus cogens* norm would be sufficient to warrant an actionable claim under the ATCA.<sup>69</sup> The court was mistaken in this holding for several reasons. First of all, as noted by another federal appellate court, "the content of the *jus cogens* doctrine . . . emanates from academic commentary and multilateral treaties, even when unsigned by the United States."<sup>70</sup> Therefore the *jus cogens* doctrine as a source of law within U.S. courts suffers from the same infirmity as customary international law generally: it is not based on any positive enactment of Congress (or even on the consent of states), but on the writings of academics. Indeed, as noted earlier, many states have not subscribed to the *jus cogens* concept at all, nor have they taken the further step of specifying what norms fall within that category.

Additionally, the problem of defining what norms of international law have achieved the status of *jus cogens* proves an imprecise endeavor by any measure:

The absence of agreement among international law scholars is so striking that one commentator expressed the status of *jus cogens* in the following terms: "no one knows where *jus cogens* comes from, no one knows whether or how or why it is part of international law, no one knows its content, no one knows how to modify it once it is articulated, and indeed no one knows whether it even exists."<sup>71</sup>

Therefore, violation of an alleged *jus cogens* norm cannot by itself provide a cause of action for plaintiffs in federal court. Plaintiffs must instead look to positive law enacted by the Congress, or alternatively to the common law as developed in courts of the U.S.<sup>72</sup> For it is the Congress, not the Judiciary, that possesses the power to create a federal cause of action. The *Sampson* court explains this issue: "Absent

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68. *Alvarez-Machain*, 331 F.3d at 613 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (1992)).

69. *Id.*

70. *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001).

71. *Id.* (quoting Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 57 (1995-1996)).

72. For example, a claim for torture would be supported in common law as a tort irrespective of its status as a *jus cogens* norm, because torture is sufficiently well defined and accepted by civilized nations. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become-like the pirate and slave trader before him- hostis humani generis, an enemy of all mankind").

congressional direction, such overactive involvement by our judiciary would challenge the consent-based structure of our constitutional system.”<sup>73</sup>

Some of the confusion over the proper role in U.S. courts of both *jus cogens* and customary international law may be explained by the changing nature of the obligations governed by these doctrines. The modern evolution of *jus cogens* and customary international law norms has witnessed a shift away from regulating the relationships between states in the international arena. The new *jus cogens* and customary international law norms instead focus on governing the relationships between a nation and its citizens:

[I]n contrast to the traditional CIL that primarily governed relations between nations, the CIL applied in the post-Filartiga period almost exclusively regulates relations between a nation and its citizens on such matters as torture, capital punishment, inhuman and degrading treatment, prolonged arbitrary detention, and freedom of thought, conscience, and religion.<sup>74</sup>

The list of potential violations of customary international law continues to grow, and some human rights advocates would like to see the list expand in an open-ended fashion: “As a leading authority on international human rights has observed, ‘given the rapid continued development of international human rights, the list as now constituted should be regarded as essentially open-ended. . . . Many other rights will be added in the course of time.’”<sup>75</sup> Courts looking to the writings of academics may soon begin to recognize a virtually unlimited number of individual rights based on customary international law.<sup>76</sup>

While the concept of *jus cogens* should not govern the relationships between the U.S. and its citizens in federal court, the concept does have some utility in international tribunals. For example, a nation suing the U.S. in the International Court of Justice might rely on the concept of *jus cogens* in defining international obligations among states. The ICJ, as an international institution, may rely on international law to provide a rule of decision in a case, without the need for incorporation from another branch of government. The *jus cogens* concept therefore finds its proper role within the international, not the domestic, legal system.

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73. *Sampson*, 250 F.3d at 1155.

74. Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2264 (1998).

75. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 841 (1997) (quoting THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 99 (1989)).

76. See *The Paquete Habana*, 175 U.S. 677 (1900).

#### IV. Conclusion

United States courts are currently addressing important questions of international law that should be decided in accordance with the Constitution of the United States and the separation of powers principle. Specifically, the courts must respect the will of Congress when interpreting treaties and the private rights they provide in federal courts. The courts should define customary international law by reference to state practice and in this context must be careful not to give inappropriate weight to the writings of academics. As a further matter, courts should not look to the concept of *jus cogens* or customary international law generally when defining legal relationships between the United States and its own citizens. In sum, concerns of democratic accountability and respect for the sovereignty of the United States and the constitutionally based separation of powers principle buttress the doctrinal contention that it is the duty of Congress to incorporate international law into federal law through the appropriate democratic processes.

The incorporation of international law into U.S. law may be a laudable goal, especially with respect to human rights law, but the ends cannot justify improper means. Judges and law professors wishing for the rule of international law in U.S. courts must respect the Constitution of the United States and await further action by the democratically elected officials in the legislative branch of government.